



STATE OF DELAWARE  
DEPARTMENT OF NATURAL RESOURCES  
AND ENVIRONMENTAL CONTROL

OFFICE OF THE  
SECRETARY

89 KINGS HIGHWAY  
DOVER, DELAWARE 19901

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**NOTICE OF CONCILIATION  
AND SECRETARY'S ORDER**

Pursuant to 7 Del. C. § 6005(b)(2)

**Order No. 2008-W-0033**

**Issued To:**

VFL Technology Corporation  
16 Hagerty Boulevard  
West Chester, PA 19382-7594

**Registered Agent:**

The Corporation Trust Company  
Corporation Trust Center  
1209 Orange Street  
Wilmington, Delaware 19801

WHEREAS, VFL Technology Corporation, Headwaters Resources, and/or Headwaters, Inc., collectively referred to herein as VFL, operates a biosolids treatment facility adjacent to the City of Wilmington's (City) wastewater treatment plant (WWTP); and,

WHEREAS, in addition to other materials, this facility converts 60,000 tons of biosolids from the City's WWTP and 100,000 tons of fly ash from the Conectiv coal-fired power plant on Hay Road into a usable product called "stabilized biosolids," and,

WHEREAS, this stabilized biosolids product is managed under a Limited Distribution & Marketing Permit issued by the Department of Natural Resources and Environmental Control's (DNREC or the Department) Division of Water Resources and a Beneficial Use Determination approved by the Division of Air & Waste Management; and,

WHEREAS, the Department commissioned a report on "Waste Issues and Landfill Capacity in Delaware" prepared and issued by McCabe & Associates in November 2005, which highlights the challenges and opportunities for the beneficial use of these materials; and,

*Delaware's Good Nature depends on you!*

WHEREAS, the WWTP biosolids and power plant fly ash, if no longer processed into stabilized biosolids, would require re-use in some environmentally safe manner or disposal in an appropriately permitted landfill. Due to contractual arrangements between Conectiv and the Delaware Solid Waste Authority (DSWA), it is likely that a portion of the fly ash would be disposed of as a solid waste at the nearby DSWA Cherry Island Landfill; and,

WHEREAS, the disposal of this material could consume significant capacity in the DSWA Cherry Island Landfill requiring both the closing of the landfill prior to 2025 and the development of new waste management options (as outlined in the Governor's Solid Waste Technical Working Group Report, Solid Waste Management Alternatives for Delaware, dated May 15, 2006); and,

WHEREAS, if the disposal of the City's WWTP biosolids occurs at the DSWA Cherry Island Landfill, costs to the City could increase by an estimated \$2.9 million to \$3.7 million per year and costs for the disposal of fly ash generated at the Conectiv Power Hay Road facility could increase as well; and,

WHEREAS, the Department alleges that VFL is not in full compliance with its existing Limited Distribution & Marketing Permit; and,

WHEREAS, VFL neither denies nor admits to these allegations by the Department; and,

WHEREAS, both DNREC and VFL desire that the biosolids treatment facility operate under more appropriate requirements than are currently available under the above-referenced and applicable permits and approvals; and,

WHEREAS, DNREC and VFL desire and commit to work cooperatively and communicate regularly to effectuate the purposes of this Notice of Conciliation (NOC or Notice) and Secretary's Order (Order); and,

WHEREAS, DNREC and VFL agree that the performance of the actions identified in this Order will result in improving the environmental management and oversight of the VFL biosolids treatment facility; and,

NOW THEREFORE, without any admission of fact or law and without any admission to alleged violations of Delaware law or regulations, VFL agrees to enter into this Notice of Conciliation and Secretary's Order as set forth below:

### **FINDINGS**

Since May 1993, VFL Technology Corporation of West Chester, Pennsylvania, Headwaters Resources, and/or Headwaters Inc., collectively referred to herein as VFL, has been under contract to the City and/or its contractor to process digested biosolids from the City's wastewater treatment plant. The process converts the WWTP's digested biosolids into construction products.

In March 2008, VFL provided the Department with an update to the original application and Operations Plan information submitted in 1995 for approval of a permit for the Limited Distribution & Marketing of biosolids products. The revised application and Operations Plan was submitted in accordance with DNREC's "Guidance and Regulations Governing the Land Treatment of Wastes."

The Limited Distribution & Marketing Permit (Permit No. DM 0009/95C or Permit), originally applied for by VFL, pertains to stabilized biosolids used as products that meet or exceed all 40 CFR Part 503 requirements ("Part 503" or "503") for Class A (SYNSOIL) or Class B (non-SYNSOIL) stabilized biosolids. Both Class A and Class B processed biosolids from the City of Wilmington WWTP, which meet all Part 503 requirements, are shipped to approved, off-site locations in accordance with the Permit issued by DNREC.

VFL is required to operate in accordance with the Limited Distribution & Marketing Permit and application/Operations Plan that was submitted to the Department on April 5, 1995. A request for permit renewal was submitted without change on December 10, 2004, and the subsequent permit issued by the Department became effective on July 1, 2005. Since 1998, VFL operated its facility in a manner that was not in accordance with the application/Operations Plan approved by the Department. VFL did not request a revision to the application/Operations Plan to reflect changes made by the operator of the wastewater treatment plant.

### **REGULATORY AND STATUTORY PROVISIONS**

Title 7 Del.C. § 6003(b)(2) states:

“No person shall, without first having obtained a permit from the Secretary, construct, install, replace, modify or use any equipment or device or other article which may cause or contribute to the discharge of a pollutant into any surface or ground water.”

### **CONCLUSION**

The Department determined that VFL Technology Corporation, Headwaters Resources, and/or Headwaters Inc. violated and is currently in violation of 7 Del.C. § 6003(b)(2) by operating its facility in a manner that is not in compliance with its Limited Distribution & Marketing Permit (DM 0009/95C), application/Operations Plan, and the “Guidance and Regulations Governing the Land Treatment of Wastes.”



## **NOTICE OF CONCILIATION AND ORDER**

In consideration of the foregoing findings, notice is hereby given that it is proposed, pursuant to 7 Del. C. §6005 (b)(2), that VFL undertake the following actions:

1. Within forty-five (45) days of the effective date of this Order, VFL shall submit a revised application and Operations Plan for the Limited Distribution & Marketing Permit DM 0009/95C that reflects current operations at the facility to the Director of DNREC's Division of Water Resources (Director).
  - a. Such submittal shall include a specific "recipe" or "formula" for each product manufactured using stabilized biosolids. The product formulations shall provide a range of biosolids to additives ratio necessary to make the product. The need for each additive should be justified in detail. If this information "recipe" is considered confidential business information, the company should submit such information in accordance with the requirements of Section 6 of the Department's regulations governing requests for information under Title 29, Chapter 100.
  - b. All product shall consist of a minimum biosolids content of not less than ten percent (10%) by weight. In addition, all product formulations shall contain an average monthly biosolids content of not less than fifteen percent (15%). This biosolids content shall be demonstrated monthly through the use of a mass balance calculation submitted to the Department within five (5) working days from the last day of each month.
  - c. VFL shall compile and electronically submit an update to and an analysis of the data collected under the existing permit in a form acceptable to the Department.
  - d. VFL shall submit updated computer aided design (CAD) drawings of the facility, which include all stockpile locations and process components.
  - e. The revised Operations Plan shall include a proposal to maintain a log of pugmill operational hours, material handling procedures, and a contingency plan for those occasions when the pugmill is non-operational.

- f. The revised Operations Plan shall detail the exact manner in which stabilized biosolids shall be managed on-site with respect to transport, storage, fugitive dust, and odor controls.
  - g. VFL shall identify all business entities with which it is affiliated, including but not limited to, Headwaters Resources and Headwaters Incorporated and submit information that sets forth in sufficient detail the corporate relationships between itself and the other entities and the mechanism in which any acquisition or merger was made. VFL shall further identify any and all entities of which it is a subsidiary or of which it is the parent corporation.
  - h. VFL shall identify all contracts or sub-contracts with the City of Wilmington and/or Veolia under which VFL operates the biosolids treatment facility adjacent to Wilmington's WWTP.
- 2. Within forty-five (45) days of the effective date of this Order, VFL shall submit to the Director a plan for covering the "bunker" into which the digested biosolids are piped from the WWTP. Such plan shall be implemented and completed by VFL within one hundred-twenty (120) days of review and approval by the Department.
- 3. Within forty-five (45) days of the effective date of this Order, VFL shall submit to the Director a revised closure plan and closure cost estimate for review and approval. The closure plan shall clearly define the areas and dimensions of the wastewater treatment plant lagoons that were closed utilizing stabilized biosolids. VFL shall submit a letter from the City of Wilmington documenting its concurrence with the lagoon closure areas and the post-closure use of the site. With the Department's agreement, these areas and the stabilized biosolids materials used for lagoon closure and post-closure use of the site shall be excluded from the VFL closure plan.
- 4. Within thirty (30) days of the effective date of this Order, VFL shall provide to the Director a financial assurance instrument in the amount of five-hundred thousand dollars (\$500,000.00) or, alternatively, a parent guarantee from Headwaters Incorporated. Such financial assurance instrument or guarantee shall be in a form acceptable to the

Department and shall serve in the interim as the financial assurance instrument to implement closure until a final closure plan and cost estimate is submitted to and approved by the Department as required in Item 5 below.

5. Within forty-five (45) days of the Department's approval of the revised closure plan and closure cost estimate, VFL shall submit to the Director a financial assurance instrument in a form acceptable to the Department and sufficient to implement the approved plan, which will replace the financial assurance instrument required in Item 4.
6. Within thirty (30) days of the closure plan approval by the Department required in Section 3 above, VFL shall submit to the Director a detailed plan for the management and reduction of the remaining stabilized biosolids product stored on site. The management and reduction plan shall set forth a method for reducing the quantity of remaining stabilized biosolids stored on-site to no more than twenty-five percent (25%) of its current level within two (2) years of the Department's approval of the plan. Adjustments to the target stockpile level and timeline may be made upon approval of the Director and the Secretary of the Department of Natural Resources and Environmental Control. From the effective date of this Order forward, VFL shall not increase the amount of stabilized biosolids product stored on site by more than 20,000 tons. On a monthly basis, VFL shall prepare and submit to the Director a daily record of stabilized biosolids product produced and shipped off-site for use until the management and reduction plan has been approved by the Department (at which time this requirement may be replaced with similar reporting requirements of the plan).
7. Within sixty (60) days of the effective date of this Order, VFL shall develop and submit to the Director a revised engineering plan for managing stormwater on site. Such plan shall be implemented and completed by VFL within one hundred-eighty (180) days of review and approval by the Department.

8. Within thirty (30) days of the effective date of this Order, VFL shall develop and submit to the Director of Water Resources a proposal for testing of the stabilized biosolids products. The testing procedures or plan shall be implemented within thirty (30) days of the Department's review and approval.
9. Within thirty (30) days of the effective date of this Order, VFL shall develop and submit to the Director a proposal for recordkeeping and reporting requirements of the stabilized biosolids products. The recordkeeping and reporting provisions shall be implemented within thirty (30) days of the Department's review and approval.
10. Within sixty (60) days of the effective date of this Order and from that date forward, all fly ash and digested biosolids materials stored on-site awaiting processing into stabilized biosolids shall be stored under cover.

#### **FORCE MAJEURE**

If any Force Majeure Event<sup>1</sup> occurs that causes or may cause a delay or impediment to performance by VFL, its contractors, or any entity controlled by VFL in complying with any provision of this Notice of Conciliation and Order due to a cause or causes that are outside VFL's control and could not be avoided by the exercise of due care, VFL shall notify the Department in writing as soon as practicable or, in any case, within twenty (20) business days of when VFL first knew of the event or should have known of the event by the exercise of due diligence. In this notice, VFL shall specifically reference this provision of the NOC and Order and describe the anticipated length of time the delay may persist, the cause or causes of the delay, and the measures taken or to be taken by VFL to prevent or minimize the delay and the schedule by which those measures will be implemented. VFL shall adopt all reasonable measures to avoid or minimize such delays, and the Department shall provide VFL with such extension of time as VFL reasonably estimates is needed to fully perform its obligations

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<sup>1</sup> "Force Majeure Event" shall mean occurrences beyond the control of VFL, its contractors or any entity controlled by VFL, including without limitation, acts of war or terrorism, strikes, lock-outs, flood, fire, earthquake, other acts of God, accidents involving utilities, or governmental acts for which VFL has had no prior or insufficient notice.



described herein. Unanticipated or increased costs and expenses associated with the performance of VFL's obligations under this NOC shall not constitute circumstances beyond VFL's control or serve as a basis for an extension of time.

Failure by VFL to comply with the notice requirements of the immediately preceding paragraph shall render this section voidable by the Department as to the specific event for which VFL failed to comply with such notice requirements; and if voided, it shall be of no effect as to the particular event involved.

### **ENFORCEMENT**

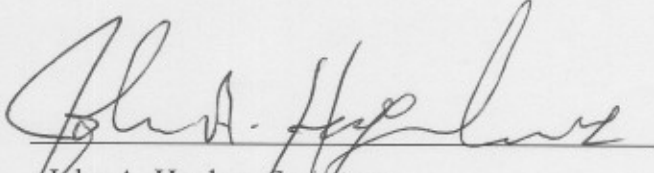
Enforcement of this NOC shall be effected according to the terms of 7 *Del. C.* § 6005.

## PUBLIC HEARING

This Notice and Order shall become effective and final unless the Secretary receives from VFL Technology Corporation, Headwaters Resources, and/or Headwaters, Inc., no later than thirty (30) days from receipt of this Notice, a written request for a public hearing on these matters as provided in 7 Del.C. § 6005(b)(2). In the event VFL requests a hearing, the Secretary reserves the right to withdraw this Notice and Order and to take additional enforcement actions regarding these and other potential violations at the VFL facility, including but not limited to, the imposition of civil penalties and recovery of the Department's costs and attorneys' fees. The Department does not otherwise intend to convene a public hearing on these matters but reserves the right to do so at its discretion. In the event that VFL does not request a hearing and this Order becomes final as provided above, the Department retains and reserves the right to bring any additional enforcement, penalty, injunctive, or other action or appropriate legal proceeding.

If you have any questions, please contact Department at (302) 739-9949.

7-31-08  
Date

  
John A. Hughes, Secretary  
Department of Natural Resources  
& Environmental Control

c: Kathy Bunting-Howarth, J.D., Ph.D, Director  
Kevin Maloney, Deputy Attorney General  
R. Peder Hansen, Program Manager  
Michael Green, Paralegal

## ***WAIVER OF STATUTORY RIGHT TO A HEARING***

**VFL Technology Corporation** hereby waives its right to a hearing and its opportunity to appeal or contest this Notice of Conciliation and Secretary's Order and agrees to perform each of the actions listed in paragraphs 1-10 of the attached NOC within the time periods set forth therein.

**VFL Technology Corporation**

Date: \_\_\_\_\_

By: \_\_\_\_\_

Title: \_\_\_\_\_